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Supreme Court
OF THE UNITED STATES

OCTOBER TERM, 1946

No. 190

ZACHARY BOZZA,

Petitioner,

—*vs.*—

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

HAROLD SIMANDL,
Attorney for Petitioner.

In Petitioner's Brief—Zachary Bozza v. United States of America—No. 190

Addendum Page 12, Line 22

After citation Norris v. United States (C. C. A. 3), 34 F. (2d) 839: Certiorari granted, 281 U. S. 707, and judgment reversed, 281 U. S. 619, on other grounds. See Gebardi v. United States, 287 U. S. 112, 119.

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BRIEF FOR PETITIONER

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 137-144) is reported in 155 F. (2d) 392.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered May 17, 1946 (R. 145). The petition for a writ of certiorari was filed June 15, 1946, and was granted October 14, 1946 (R. 147). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925; and Rule 37 (b) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

Questions Presented.

(1) Whether a mere casual employee or laborer who works at an illicit still, but who has no ownership, title or interest in the still, its operation or its product, can be held to be engaged in carrying on the business of a distiller with intent wilfully to defraud the United States of tax and punished as a "principal."

(2) Whether a mere casual employee or laborer who works at an illicit still, always in the presence of and with his employer (the owner and proprietor of said still), can be held to have aided and abetted the "possession, custody and control" of the still, and the failure to register it with the District Supervisor and be punished therefore, as a "principal."

(3) Whether the Trial Court was bound to direct a verdict of acquittal where the undisputed proof affirmatively established the innocence of the petitioner of the charge laid in the Third Count of the indictment.

(4) Whether the Trial Court in imposing sentence, having made a mere technical error of which petitioner did not complain, could increase petitioner's punishment after he commenced to serve said sentence.

(5) Whether portions of the Trial Judge's charge delivered in the form of an animated argument went beyond permissible limits and amounted to acts of advocacy in favor of the government.

(6) Whether there was sufficient competent testimony of petitioner's guilt to justify the submission of the case to the jury, on the first, second and third Counts of the indictment.

Statutes Involved.

The pertinent statutes are as follows:

I. R. C., Sec. 2833 (a): Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *

I. R. C., Sec. 2810 (a): Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; * * *

* * * * *

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years. * * *

I. R. C., Sec. 2834: No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized accord-

ing to law; * * *. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. * * *.

Section 332 of the Criminal Code (18 U. S. C. 550): Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

Statement.

Count 1 of a six-count indictment filed in the District Court for the District of New Jersey charged that petitioner, Nicholas Chirichillo, Ellen Vettor and Peter Milito, on or about January 19, 1943, at Woodbridge Township in the County of Middlesex, State and District of New Jersey, engaged in and carried on the business of a distiller and distilled a quantity of spirits, with intent to defraud the United States of the tax thereon, in violation of I. R. C., Section 2833 (a). (R. 5). Count 2 charged that the same defendants, at the same time and place, had in their possession, custody and under their control a still set up, which they failed and neglected to register with the District Supervisor of the Alcohol Tax Unit, in violation of I. R. C. Section 2810 (a) (R. 6). Count 3 charged that at the same time and place, they did wilfully and unlawfully make and ferment a quantity of mash fit for distillation in a building not a duly authorized distillery, in violation of I. R. C., Section 2834 (a) (R. 7).[1] Petitioner and Chirichillo were convicted after trial by a jury on all of the five counts (R. 2).[2]

---

1. It is unnecessary to summarize the allegations of the last three counts (R. 7-9). Count 6 (R. 9) did not concern petitioner, and the Trial Court dismissed it (R. 2). His conviction was reversed by the Circuit Court of Appeals on counts 4 and 5.

2. A severance was granted as to Ellen Vettor (R. 1) who became a witness for the government (R. 10). A verdict of acquittal was directed in favor of Milito (R. 2, 92, 94).

On the morning of July 23, 1945, petitioner was sentenced to concurrent terms of imprisonment for two years each, on Counts 1, 2 and 3 (R. 115). Thereafter, petitioner entered upon the service of his sentence (Stipulation R. 116). Later, on the same day, petitioner was brought before the Judge, who increased the punishment by imposing on Count 1 a fine of $100, on Count 2 a fine of $100. and a penalty of $500., and on Count 3, a fine of $500 (R. 3, 116, 117). On appeal, the convictions on Counts 1, 2, and 3 were affirmed, but the convictions on 4 and 5 were reversed for insufficiency of evidence to justify their submission to the jury, and the cause was remanded for entry of judgment of acquittal on those counts (R. 140, 142, 144, 145).

The evidence so far as it relates to Counts 1, 2, and 3 may be summarized as follows:

Ellen Vettor commenced serving as a housekeeper for Chirichillo in Elizabeth, New Jersey in March, 1944 (R. 10). In October, 1944, he told her he was going to manufacture alcohol (R. 13, 33). He told her he intended renting a farmhouse located on Cleveland Avenue in Woodbridge Township, New Jersey owned by Mrs. Collacaro for that purpose (R. 12). She was present when he arranged the letting with Mrs. Collacaro and paid her the rent (R. 11, 32). She and Chirichillo took possession of the farmhouse in October. The only furnishing they placed in it was a studio couch which they took from Chirichillo's apartment in Elizabeth (R. 11, 34). She remained at the farmhouse until she went to the hospital in January, 1945 (R. 14). In November, after they took possession of the farmhouse, she saw Chirichillo, a man named Dominick, and another party (who was not in Court), carry still parts into the farmhouse (R. 13, 14, 15, 25). Chirichillo purchased a 1936 Ford Sedan and used it to bring the still parts to the farm (R. 24). Chirichillo erected the still (R. 15). It took him at least a month to construct it, and it was finished by the latter part

of November (R. 25). Chirichillo then brought in the sugar, coal and other supplies for operating the still (R. 14, 21). Chirichillo (and no one else) made the mash (R. 16, 33). She saw him place the sugar, water and yeast in the mash tanks and vats located in the attic of the building (R. 16, 33). At first, she said she saw no one else at the still (R. 14). Then she said Dominick and Chirichillo did the cooking during the day (R. 22). Chirichillo manufactured, Dominick and "Jack Bozza" helped out (R. 15). "Bozza wasn't there every day in the week. He would just come around between two and three times a week * * *. He was not there steady. He would take instructions from Chirichillo and just help him around" (R. 18, 22). The alcohol was placed in cans and carted away by Chirichillo and Pete Milito (R. 17). Chirichillo and others, (not Bozza) would load the cans in the automobiles (R. 17, 18). She had no housework to do at the farm, and she denied she worked at the still (R. 36, 40). She devoted most of her time to drinking the alcohol that was manufactured (R. 41, 35, 34). She drank a quart of the alcohol almost daily. Chirichillo would prepare bottles containing alcohol and water for her (R. 43). Two such bottles found in the kitchen by the inspectors contained 182.8 proof alcohol.

In January, 1945, after Chirichillo had left the farmhouse, she went to the second floor and opened a can and drank some of its contents. "It wasn't good" (R. 30). She began to turn purple, and when Chirichillo saw her upon his return, he took her to the Rahway General Hospital (R. 30, 31). She was in a coma upon her admission (R. 84). While she was at the hospital she was questioned by an investigator (R. 31). She remained in the hospital about a week, and was removed to the Middlesex County Workhouse.

Shortly after midnight, January 17th, 1945, she accompanied a group of officers of the State Department of Alcoholic Beverage Control, and directed them to the farm-

house (R. 14). They entered and found it barren of furniture or furnishings except a cot with a couple of old blankets on it (Tr. 8, 43). On the second floor they found a still of approximately 300 gallon capacity set up, but not in operation. In the attic they found 6 empty galvanized vats, and twelve 100 gallon hogsheads, 6 of them filled with fermenting sugar mash (Tr. 21, 22). In the cellar they found a boiler, but there was no fire in it (Tr. 13).

In her statement to the investigators Ellen Vettor had mentioned a man called "Jack" (R. 40). There was no proof that petitioner was ever known as "Jack" (R. 40). About 10 days prior to the trial, she was arrested and confined in the Hudson County Jail (R. 37, 10). There, she was shown about 55 photographs by an Agent (C. 40, 42). Among them was the picture of petitioner (C. 40). From the time of her arrest in January, 1945 until the day she appeared at the trial, she had never been brought face to face with petitioner and asked to identify him (R. 43). Milito is a farmer who owns a neighboring farm (Tr. 63). Each year he rented Mrs. Collacaro's ground (Tr. 63, 64). He denied he was acquainted with petitioner, and insisted that the first time he ever met him was at the trial (R. 57). He never saw petitioner at the Collacaro farm (R. 62). He denied the charges (R. 51). Chirichillo denied that he knew petitioner or had ever met him prior to the day they were called upon to plead to the indictment (R. 88). He denied that he ever met petitioner at the Collacaro farm (R. 78, 88). Petitioner did not testify.

Summary of Argument.

I.

The Circuit Court of Appeals erroneously decided that Chirichillo directly committed the offenses charged in the first three counts, and that petitioner aided, abetted or counselled the commission of said offenses (R. 140).

As to Count 1. The offense charged in Count 1 consists of two material elements, i. e.—(1) the act of carrying on the business of a distiller (2) with intent to defraud the United States of the tax.

To hold one liable as an aider and abettor, there must exist a community of unlawful intention between him and the perpetrator of the crime. He must, in some way, associate himself with the venture, and participate in it as in something that he wishes to bring about and by his action make succeed. He must stand in the same relation to the crime as the criminal—approach it from the same direction, and touch it at the same point.

The proof disclosed petitioner to be merely a casual employee of Chirichillo, without ownership, title or interest in the still, its operation or its product. His service may have consisted of no more than to clean the furnace, remove ashes and similar menial chores. His sole interest was his daily wage.

Just as the purchaser is not considered the aider and abettor of the seller, so petitioner should not be regarded the aider and abettor of the offense in question.

As to Count 2. The evidence established that on each occasion that petitioner was present at the still, Chirichillo, his employer, was also present directing him. Petitioner was never alone with the still. Chirichillo was therefore, *exclusively*, in possession, custody and control of the still. Petitioner's presence, in the capacity of an employee, did not convert Chirichillo's *exclusive* possession, custody and control into a joint possession, custody and control of himself and Chirichillo within the meaning of the law. Nor did it aid or enhance Chirichillo's exclusive status. Petitioner was not obligated to register the still, and there was no proof that he had anything to do with Chirichillo's refusal or failure to register it, or that he could have controlled Chirichillo's actions in that regard.

As to Count 3. The proof *affirmatively* established that Chirichillo *alone* made the mash (R. 16, 33). While making mash may be a part of the process of manufacturing alcohol, it is perfectly plain that Chirichillo brought the supplies to the farmhouse, took them to the attic and placed them together with the water in the vats, *himself*. Petitioner was entitled to a directed verdict.

II.

The Circuit Court of Appeals erroneously decided that the Trial Court's failure to impose fines as part of its sentence upon petitioner in the first instance, was a "void act" and that therefore it had the power to increase petitioner's punishment after he had, without protest or complaint, entered upon the service of said sentence (R. 141).

Every imposition of sentence at variance with the statutory requirements is not a "void act." It is only so regarded, when the Court passes *beyond the limits* of the statute.

The overwhelming weight of Federal *jurisprudence* is to the effect that a failure of a Court to impose a fine in addition to imprisonment is but a mere "technical error" of which the prisoner can not complain because it is favorable to him. It is *within* the limits of the statute, *not beyond it*. Petitioner, without protest or complaint, began to serve the sentence as originally imposed. It was not void or a nullity, and the Trial Court, thereafter, was powerless to add to it.

III.

The record shows that practically the last words that the jury heard from the Trial Judge before they retired to deliberate were a dramatic and impassioned appeal to their patriotism, citizenship and sympathy (R. 106, commencing

line 25 *et seq.*) (Assignment of Error No. 16) (R. 131). His remarks were accompanied by gesticulations, striking of the desk for emphasis, shouting and inflections of voice (R. 109-111). They sounded more like comment of a zealous Prosecutor rather than instructions by an impartial Judge. What the Trial Judge said, and the manner in which he said it after counsel made objection, did not effectively remove the prejudice already created (R. 109).

The case against petitioner was woefully weak, but the Trial Judge's closing remarks and actions undoubtedly prejudiced the jury against him. The Circuit Court of Appeals did nothing to correct the wrong.

ARGUMENT

POINT I.

The trial court erred in refusing to direct a verdict of acquittal on counts 1, 2 and 3 of the indictment.

This issue is raised by assignments of error 1, 2, 8, 9, 10, 12, 22 and 23 (R. 118-134). It arises from motions addressed to each count of the indictment, both at the end of the government's case (R. 45) and at the end of the entire case (R. 92) for a directed verdict. Exceptions were noted to the rulings complained of (R. 45, 92).

The Circuit Court of Appeals held—"Vettor's testimony justified a jury finding that Chirichillo directly committed and Bozza aided, abetted or counselled the commission of the offenses charged in the first three counts." * * * (R. 140).

As to Count 1.

Chirichillo was the lessee of the farmhouse and possessor and proprietor of the still. While the still was in operation, petitioner came to the premises two or three times a week and received instructions from Chirichillo and would—"help

him around" (R. 18, 22). There was no proof that the operation of the still required more than the services of Dominick and Chirichillo (R. 22). Hence, it is reasonable to assume that petitioner's casual visits were for the sole purpose of cleaning the furnace, removing the ashes, garbage and the like.

There was no proof that he had a financial interest in the still, its product or anything at the farmhouse. In fact, there was not a scintilla of evidence that he had the financial means of acquiring such an interest. There was no proof that he was in any wise liable for the tax, or that he had an inducement or purpose to defraud the government out of the tax on the product that was distilled. His sole interest was the daily wage that he might receive.

In *United States* v. *Simmons*, 96 U. S. 360, 364 this Court held:

> • • • "punishment is not inflicted merely or solely because of the intent to defraud. It is the act of engaging in the distillation of spirits, combined with that intent, which constitutes the offense."

In *United States* v. *Peoni* (C. C. A. 2), 100 F. (2d) 401, is contained a discussion of Title 18, U. S. C. A., Section 550, and the historical development of the formula—"aids, abets, counsels, commands, induces or procures." The Court said at page 402:

> "It will be observed that all these definitions • • • demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude towards it."

In *Norris* v. *United States* (C. C. A. 3), 34 F. (2d) 839, 842, the Court said:

> "'We are satisfied that the purchaser is not an abettor of the offense within the meaning of the statute. The 'abetting' intended by it is a positive act in aid of the commission of the offense—a force, physical or moral, joined with that of the perpetrator in producing it. * * * The abettor, within the meaning of the statute, must stand in the same relation to the crime as the criminal —approach it from the same direction, touch it at the same point. This is not the case with the purchaser of liquor. His approach to the crime is from the other side; he touches it at wholly another point. It is somewhat like the case of a man who provokes or challenges another to fight with him. If the other knocks him down, he has induced, but in no proper sense abetted, this act of violence. He has not contributed any force to its production. He touches the offense wholly on the other side. The purchaser of liquor, by his offer to buy, induces the seller of the liquor to make the sale; but he cannot be said to 'assist' him in it. * * *"

See also *Morei* v. *United States* (C. C. A. 6), 127 F. (2d) 827.

In *Partson* v. *United States* (C. C. A. 8), 20 F. (2d) 127, appellant Partson, together with one Clausen and Sinovitch were charged with engaging in and carrying on the business of a distiller and making and distilling one proof gallon of spirits subject to tax, with intent then and there to defraud the United States. The proof showed that Clausen owned and occupied the farm where the still was seized. The officers found Partson at the still working and he admitted that he was an employee. The Court said:

"There was no evidence that the defendant had any financial interest in any of the real or personal property in or on the Clausen farm, except his clothes, or in the business thereof, except his interest in his hourly wages. The act of Congress under which he was indicted was a revenue act, the purpose of the section under which he was indicted was to prevent a distiller from defrauding the government out of the tax upon the product which he manufactured, and the defendant's intent to defraud was a condition precedent to his commission of the offense the section denounces. Partson had no interest in the property or the business. He was not and would not be liable for the tax, because neither the plant nor the product nor any part of it was or would be his property. There was no substantial evidence that he had any inducement to or purpose to defraud the government out of that tax. He was presumed to be innocent of any such intent and a studious review and consideration of all the evidence has forced our minds to the conclusion that all the substantial evidence in this case is not only as consistent with, but is more consistent with, innocence on his part than with his guilt of any intention to defraud the government out of the tax on the product Mr. Clausen was making."

In *Anderson* v. *United States*, (C. C. A. 5) 30 Fed. (2d) 185, 187, appellant was convicted of carrying on the business of a retail liquor dealer, without having paid the special tax. In reversing the conviction, the Court said:

* * * "One who is a mere employee may be guilty as an accomplice of making an illegal sale of liquor, but he cannot be an accomplice, and therefore regarded as a principal, in conducting a business, unless he is in fact one of the properietors whose duty it is to pay the licence tax." * * *.

In *United States* v. *Logan*, (C. C., E. D. Tenn.), Fed. Cas. 15, 624, 26 Fed. case, page 992 the Court held:

> * * * "but if the proof shall also show that the defendant was not the proprietor and had no interest in the distillery, and was only employed by some other person as a laborer, in carrying on the work of distilling, then in law he can not be said to be carrying on the business of a distiller."

Acc: *United States* v. *Cooper*, (C. C., E. D. Tenn.) Fed. Cas. No. 14, 863, 25 Fed. Cas., page 627.

In *Seidey* v. *United States*, (C. C. A. 2), 16 F. (2d) 197. the Court discussed I. R. C., Section 2833a and said:

> "This section was plainly directed only against the proprietor, and a workman cannot commit or abet it."

Notwithstanding that the proof, in its best light to the government, indicated that petitioner "was merely an underling serving at the beck and call of an employer", and that he applied as the law of the trial, the propositions of law hereinbefore set out, the Trial Judge submitted the issue to the jury (R. 102). Plainly, it was a court question. *Graceffo* v. *United States*, (C. C. A. 3) 46 F. (2d) 852.

As to Count 2.

The evidence clearly established that Chirichillo had *exclusive* possession of, dominion and control over the still.[3] When petitioner came to the premises two or three times a week, he would receive instructions from Chirichillo and "help *him* around" (R. 18, 22). In other words, Chirichillo

3. "The possession and control and the operation of a distillery is by the statute made a vital element of the offense, and the person in such possession and control is made the offender." *Grunwald* v. *United States* (C. C. A. 3), 94 F. (2d) 952.

was present when petitioner helped him. There was no proof that petitioner ever had *custody* of the still, or that he was *alone* on the premises for any period of time so as to permit such *custody*.

In *Seiden* v. *United States* (C. C. A. 2), 16 Fed. (2d) page 197, appellant was found tending a still which was in operation. He denied he owned it. The Court said:

> *"The jury might have found him only 'engaged in the work,' and that is scarcely the equivalent of being the proprietor of the still.* The distinction was pointed out, but the charge was not mended. Hence we think we must treat the case as though the jury had found the defendant only to have been engaged in the work, and by that we understand that he might have *been no more than a workman for the owner of the still.*"
>
> "Count 2 was for having possession, control, or custody of an unregistered still. Ordinarily, a servant has no possession of his master's chattels left in his keeping, and this was the basis of the common-law rule that he could be guilty of larceny, *U. S.* v. *Clew*, 25 Fed. Cas. 480 No. 14,819; *U. S.* v. *Strong*, 27 Fed. Cas. 1356, No. 16,411. But it has never been doubted that a servant to whose keeping chattels were consigned, had their custody, and we are disposed to think that the word was used in Revised Statutes, para. 3258 (Comp. St. para. 5994), with this distinction in mind. If the defendant was engaged in operating the still and was, as was conceded, *alone* upon the premises, it followed that it had been left in his *custody*, if only temporarily." (Italics ours.)

In *Mangiaracina* v. *United States* (C. C. A. 8), 40 Fed. (2d) 164, appellant was arrested at a still and it was claimed he admitted operating it. He denied making that admission

and testified that he was working for another hauling sugar and yeast to the premises. The Court found that his story that he was working for a mysterious employer was not believable. The Court indicated that where it appeared that one was a mere employee of another who exclusively has control and possession of a still, then that person who is a mere employee, is not guilty. The Court said:

> "This case is clearly distinguishable from the cases of Patrillo et al. v. United States (C. C. A.), 7 F. (2d) 804; Grantello v. United States (C. C. A.), 3 F. (2d) 117, and Partson v. United States (C. C. A.), 20 F. (2d) 127, relied upon by appellant. In all of those cases *possession of the contraband articles was actually shown to have been in another party.* But here the purport of the evidence was that the appellant was in custody and control of still and mash, and he sought to absolve himself by a flimsy story of employment by the mythical Daviso. There is no substantial evidence *that any person other than appellant had, or ever had, custody of the premises with which we are here concerned.*" (Italics ours.)

And at page 167, the Court approved the following charge of the Trial Court:

> "The charge of the court required the jury to find that the accused 'had in his possession and under his control a distilling apparatus'; that mere 'knowledge of the existence of a still of the fact of the operating of a still, of course, by itself, is not sufficient to convict'; that '*if one is a mere employee of another who exclusively has control and possession of a still, then that person who is a mere employee is not guilty.*'" (Italics ours.)

In *Patrilo* v. *United States* (C. C. A. 8), 7 Fed. (2d), page 804 certain officers seized a still in the home of Patrilo. The other two defendants, Genino and Catalano said they were working for Patrilo. The Court said:

> "* * * first count speaks of having, holding, and possessing property designed for the manufacturing of intoxicating liquor. This means more than physical presence and the laying on of hands. As the pleader aptly charged, it means unlawful custody and control. The evidence shows that the premises were occupied by Patrilo as his home, the still and mash were in the basement of his house at his will and wish. *So far as the evidence indicates, that condition existed regardless of anything done or said by the other two defendants. They were Patrilo's hired servants. Aside from that it does not appear they had anything else to do with it, and those services did not convert Patrilo's possession and control of themselves and Patrilo, within the meaning of the law.* Grantello v. United States (C. C. A.) 3 F. (2d) 117. No case was made against Genino and Catalano on that count. Their request for an instructed verdict should have been granted." (Italics ours.)

In *Kelley* v. *United States*, (C. C. A. 8), 61 F. (2d) 843, appellant was seen leaving a building in which the officers found an illicit still, which was running, but at the time they entered, unattended. Appellant told the officers that he was working there for an unidentified owner. Here there was evidence, even if appellant's story was true, that he was in "custody", at least temporarily, of his employer's still. The Court, at page 847, approved the following charge which the Trial Court had delivered:

> "Another proposition urged is that certain instructions requested should have been given, one particularly with relation to defendant Kelley being a mere

employee of some one else, and hence not legally guilty of possession of either of the stills referred to in the fifth count. The court in its instructions as to this said: 'The possession that is there denounced by the Statute means an actual possession by the Defendant with intent to violate the law. It would be an *excuse and a defense to that charge if it should appear that the person in possession had no real control of the still mentioned here. If he was merely there at somebody's beck and call to do some particular thing and did not have any function or responsibility of controlling and possession of the stills he would not be liable to the charge as it is made.*' We think the court covered the issues very fairly in its instructions." (Italics ours.)

Petitioner's mere presence in the capacity of an employee did not convert Chirichillo's *exclusive* possession, custody and control, into a joint possession, custody and control between himself and Chirichillo within the meaning of the law. Nor did it in anywise aid, assist or enhance Chirichillo's exclusive status. Petitioner was not obligated by law to register the still. There was no proof that he had aided, counselled, or procured Chirichillo's refusal or failure to register it, or that he could have compelled or induced Chirichillo to take a different course. The Judge charged the jury that if petitioner "were simply an underling and at the beck and call of Chirichillo, and was nothing beyond that (he) would not be guilty of the second count" (R. 102). Notwithstanding, it was a Court question, he submitted the issue to the jury.

As to Count 3.

The proof *affirmatively* established that Chirichillo (and no one else) made the mash (R. 16, 33). It was established that the hogsheads and vats wherein the mash was made and fermented were in the attic of the house (Tr. 21, 22). Ellen Vettor testified (R. 16, 33):

"Q. Now, did you ever see any materials in these tanks in the attic? A. I saw the sugar being dumped into them.

"Q. By whom? A. Nicholas Chirichillo.

Q. And who else? A. No one." * * *

And on page 33:

"Q. Well, what did you see done? A. I saw the sugar being put in the vat and the water being put in the vat and the yeast.

Q. And did Nick Chirichillo put the water in the vats and the yeast in the vats? A. He did.

Q. And did he put the sugar in the vats? A. Yes."

There was absolutely no proof whatever that petitioner had in any wise aided or assisted Chirichillo in making the mash.

This Court has held that mere speculation must not be allowed to do duty for probative facts. *Galloway* v. *United States*, 319 U. S. 379.

It was the plain duty of the Trial Court to direct a verdict of acquittal as to this count.

POINT II.

The trial court, having made a mere technical error, in imposing sentence in the first instance, of which petitioner did not complain, was without power to add further punishment after petitioner commenced to serve said sentence.

This issue is presented by Assignments of Error 19, 20 and 24 (R. 133, 134). Petitioner objected to the imposition of the additional punishment (R. 116).

On the morning of July 23, 1945, petitioner was brought before the Court and sentenced to concurrent terms of imprisonment for two years each on Counts 1, 2 and 3 (R. 2, 3, 115). Thereafter, petitioner was removed to the Hudson

County Jail (a Federal Place of Detention) to await transportation to the penitentiary at which his sentence was to be served (See Stipulation, R. 116, 117). Petitioner had entered upon the service of his sentence.[4] Thereafter, he was removed from the Hudson County Jail and brought before the Court which then imposed fines and penalties on said counts (R. 3, 116, 117).

The Circuit Court of Appeals concluded—"that the sentence as amended by the Court below is valid and operative" * * * (R. 142).

The Circuit Court recognized * * * "that a Judge is powerless to add to a sentence once validly imposed after the prisoner has begun to serve it" (R. 141).[5] It fell into error in assuming that *every* " * * * imposition of a sentence at variance with the statutory requirements is a 'void act.'"

In Bonner, Petitioner, 151 U. S. 242, this Court held that an imposition of sentence *beyond* the *limits* of the statute is a "void act" that may be superceded by a new sentence that conforms with the statute. But, where as here, the Court remains within the limit of the statute and fails to impose a fine in addition to imprisonment, it is not regarded as a "void act" but a mere "technical error" of which the prisoner can not complain, because it is favorable to him. *Matchok* v. *United States* (C. C. A. 3) 60 F. (2d) 266; *Jordan* v. *United States* (C. C. A. 4), 60 Fed. (2d) 4, 6, Certiorari denied, 287 U. S. 633, 77 L. Ed. 545, 33 Sup. Ct. 84; *Bartholemew* v. *United States* (C. C. A. 6) 177 Fed. 902, 906, Certiorari denied, 217 U. S. 608, 54 L. Ed. 901, 30 Sup.

4. Title 18 U. S. C. A., Section 709a provides: "The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: Provided, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term. (June 29, 1932, c. 310, Sec. 1, 47 Stat. 381.)

5. *United States* v. *Benz*, 282 U. S. 304, 307; *Roberts* v. *United States*, 320 U. S. 264.

Ct. 697; *Flynn* v. *United States* (C. C. A. 7), 50 Fed. (2d) 1021, 1022; *Linningen* v. *Morgan* (C. C. A. 8), 241 Fed. 645, 648; *Nancy* v. *United States* (C. C. A. 9), 16 F. (2d) 872.

When the Court imposed the original sentence, petitioner did not complain, protest or apply to have it vacated, but commenced to serve it.[6] The sentence as originally imposed was not a nullity, and after petitioner had begun to serve it, the Trial Court was powerless to add to it. *United States* v. *Benz, Supra; Roberts* v. *United States Supra.*

POINT III.

The Trial Judge erroneously closed his charge with an animated argument that amounted to an act of advocacy in favor of the Government.

This issue is presented by assignments of error 16, 17 and 18 (R. 131, 132, 133). Appropriate exceptions were taken to the Trial Judge's remarks and conduct (R. 109, 110, 111). The Circuit Court of Appeals decided this point to be * * * "without merit"— * * * "the charge in its entirety * * * a fair presentation of the case and without prejudice to the appellant." (R. 142).

When the Trial Judge delivered that portion of his charge that commenced with the words—"But it also says *this*:" (R. 106, l. 25), his manner and tone of voice changed. His remarks thereafter were accompanied by gesticulations, repeated striking of the desk for emphasis, shouting, and inflection of voice. The record is *not silent* as to this. When counsel entered objection, he mentioned—"the intonation of the voice and the striking of the desk and other things" (R. 109, 111). Chirichillo's counsel concurred in the objection because " * * * it describes the attitude of the Court * * * he properly criticized its demeanor and the *slam bang*

6. Cases like *King* v. *United States*, 98 F. (2d) 291, App. D. C. cited by the Court below are, therefore, not applicable.

ing on the desk * * * it would lead the jury to believe that the Judge was practically instructing the jury to bring in a verdict of guilty" (R. 111). The Judge did not challenge counsels' assertions, but frankly admitted his— * * * "zealousness and hitting on the desk", * * * when he undertook * * * "to make a correction" (R. 109, 110).

The Judge opened this phase of his charge by loudly proclaiming—"the government of the United States has its *rights* TOO." He emphasized that the controversy was between the United States of America—"the government of the United States"—"this country of ours"—"the people of the United States"—on the one side, and petitioner and Chirichillo on the other (R. 106, 107). He told the jury that—"the government of the United States",—"this country of ours,"—is "you (the jury) and I (the Judge) and one hundred thirty-four million other people trying to live in peace and amity and under law" (R. 106). The jury must have received the impression that the Judge thought petitioner was not trying to live "under law".

Striking his desk as he made the following comment, the Judge thundered—"that government is entitled to protection TOO" (R. 106). The Judge in effect said,—"Remember" * * * "REMEMBER—I SAY",—"that unpunished crime is also a THREAT to the continuance of this government; and while you consider and zealously consider the rights of the defendants, never for *one moment* must the rights of the people of the United States be *sacrificed*" (R. 106). This was clearly an appeal to the jury that they should not let their government down—an appeal to their patrio-

tism and citizenship, of a character one might expect to hear during the summation of a zealous prosecutor.[7]

The Judge appealed to the jury's sympathy, when discussing the testimony of the accomplice, Ellen Vettor, the government's chief witness. He pleaded—"Don't weigh a poor bedraggled female; you are not trying her"s * * * and pointing to petitioner and Chirichillo said sternly—"when you weigh *these men,* weigh them to see whether they are telling the truth or not" (R. 107). Petitioner had not testified.

Dramatically, he called the jury's attention to the oath they had taken and—"you called upon the living God to witness."[9]

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7. In *Fitter* v. *United States* (C. C. A. 2), 258 F. 567 at page 571, it was charged that *prosecutor's* summation constituted an improper appeal to the prejudice and passion of the jury:

* * * "What is the country, gentlemen? Is the country that we live in—is it these buildings; is it the shores of California, with its wonderful, velvety grass; it it the mountains; * * * is that our country? Why, no. *You are what we call our country.* The men in the courtroom. The human beings that go to make this country what it is. That is your country. I tell you that when men violate this law at this time, and they come before twelve honest, intelligent jurors, and we give them the fair trial that they have had, we give them everything that they are entitled to. We say, this shall not continue, because it is the wrong, thieving crime that will hinder or delay the uplift of a great world and make it a better place to live in, and must be stamped out in its inception; * * *" (italics ours).

8. Earlier in his charge, he had argued; "the mere fact that she (Ellen Vettor) was living in agonizingly bad circumstances and under loathsome circumstances, does not in itself stamp her testimony as perjury" (R. 105). In *Yoder* v. *United States* (C. C. A. 10), 17 F. (2d) 85 at page 87, the Court said: " * * * the court then proceeded by argument to convince the jury that the testimony of defendant and his witnesses was not to be credited or believed; that the court did not believe the testimony 'of these two witnesses' (there were four); and that to believe such testimony was to ignore ordinary common sense and ordinary human nature The *court throughout its instructions referred to Mrs. Young as 'this little girl', and spoke of her as 'attractive and fascinating.'* * * * *As a further appeal to the sympathy of the jury the court said: 'She is a little girl who is fighting her battle alone in this matter'*" (Italics ours).

9. In *Oppenheim* v. *United States* (C. C. A. 2), 241 Fed. 625, 629, 630, the Court reversed because the charge was an argument on behalf of the government. In the closing portion thereof, the Trial Judge also referred to the *solemn oath* of the jury. Said the Court: "* * * The words of the judge's charge are the last words and the most weighty words that are dropped into the minds of the jury before they come to their verdict, and it is of the utmost importance that they should be *fair and impartial*" * * * (italics ours).

This Court held in *Reynolds* v. *United States*, 98 U. S. 145, 168 that:

> "Every appeal by the Court to the passions or the prejudices of a jury should be promptly rebuked; * * * it is the imperative duty of a reviewing court to take care that wrong is not done in this way."

In *Allison* v. *United States*, 160 U. S. 203, at page 217, this Court said:

> "Where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and so intermingled with inferences springing from forensic ardor, that the jury are left without proper instructions; their appropriate province of dealing with the facts invaded; and errors intervene which the pursuit of a different course would have avoided."

In *Quercia* v. *United States*, 289 U. S. 464, 470, this Court said:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'"

In *Bihn* v. *United States*, Vol. 90, Sup. Ct. Law. ed. Advance Opinions, pages 1208, 1211, 1212, this Court said:

> "* * *, the instruction sounds more like comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials of those accused of crime. * * *"

"* * *, an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial.' *It seems plain that the inflection or tone of voice used in giving the challenged instruction could make it highly damaging.* And in any event the probabilities of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed. We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears. While there was sufficient evidence for the jury, the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See *Bollenbach* v. *United States*, 327 U. S. —, ante, 318, 66 S. Ct. 402." (Italics ours.)

In *Bollenbach* v. *United States*, Vol. 90, Sup. Ct. Law. ed. Advance Opinions, pages 318, 321, this Court said:

"'In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.' *Quercia* v. *United States*, 289 U. S. 466, 469, 77 L. ed. 1321, 1324, 53 S. Ct. 698. 'The influence of the trial judge on the jury is necessarily and properly of great weight,' *Starr* v. *United States*, 153 U. S. 614, 626, 38 L. ed. 841, 845, 14 S. Ct. 919, and *Jurors are ever watchful of the words that*

fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. * * *"* (Italics ours).

In *United States* v. *Marzano*, (C. C. A. 2), 149 Fed. (2d) 923, at page 926, the Court said:

"* * * the judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge."

In *Weare* v. *United States*, (C. C. A. 8), 1 Fed. (2d) 617, 619, the Court said:

"The jury can easily be misled by the court. Its members are sensitive to the opinion of the court, and it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue * * * in favor of the prosecution. The government provides an officer to argue the case to the jury. That is not a part of the court's duty. He is not precluded, of course, from expressing his opinion of the facts, but he is precluded from giving a one-sided charge in the nature of an argument. We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion, and that they should follow their own judgment."

In *Minner* v. *United States*, (C. C. A. 10) 57 Fed. (2d) 506 at page 513, the Court said:

"His comments were in the nature of an argument to the jury rather than a fair and dispassionate statement of what the evidence showed and a tempered expression of his opinion as to the facts. In doing so, he assumed the role of an advocate rather than an impartial judge. That this was error is established by repeated decisions" * * *.

* * * "But in summing up and commenting on the evidence, the trial judge should be governed by certain well recognized limitations inherent in the very nature of the judicial office. He should state the evidence fairly and accurately, both that which is favorable and that which is unfavorable to the accused. His statements should not be argumentative, but impartial, dispassionate, and judicial; and they should be so carefully guarded that the jurors are left free to exercise their independent judgment upon the facts."[10]

The government's case rested entirely upon the uncorroborated and unconvincing testimony of the accomplice, Ellen Vettor. She was in jail (R. 10, 37) and had hopes of getting out (R. 37) and apparently labored under the belief that she would *have* to testify favorably to the government in order to secure her freedom (R. 37, 38, 39). She was a confirmed alcoholic who consumed almost daily, a quart at least, of the raw 182.8 proof, alcohol (R. 43). A mind thus stupified and clouded could hardly offer a reliable identification. It is a matter of serious doubt as to whether she identified petitioner in the courtroom as the result of having seen him at the farmhouse, or because she recalled having

10. See also: *Hunter* v. *United States* (C. C. A. 5), 62 Fed. (2d) 217; *Adler* v. *United States* (C. C. A. 5), 182 Fed. 464; *Greene* v. *United States* (C. C. A. 5), 154 Fed. 401, 413; *Frantz* v. *United States* (C. C. A. 6), 62 Fed. (2d) 737, 739; *Cook* v. *United States* (C. C. A. 8), 14 Fed. (2d) 833, 834; *Stokes* v. *United States* (C. C. A. 8), 264 Fed. 18, 24; *Carney* v. *United States* (C. C. A. 9), 295 Fed. 606, 607; *DeGroot* v. *United States* (C. C. A. 9), 78 Fed. (2d) 244, 249, 250; *Williams* v. *United States* (C. C. A. 9), 53 F. (2d) 685; *Strader* v. *United States* (C. C. A. 10), 72 F. (2d) 589, 592; *Leslie* v. *United States* (C. C. A. 10), 43 Fed. (2d) 288, 289.

seen his face among the photographs that were shown her at the jail. The Trial Judge disregarded her testimony against Milito and acquitted him (R. 92). Chirichillo and Milito had denied that petitioner was at the farmhouse (R. 62, 78, 88).

It can be fairly said that the case against petitioner was extremely weak. The jury entered upon their deliberations with the Judge's closing animated argument ringing in their ears and fresh in their minds. Thus inflamed, there is little likelihood they accorded the evidence that fair, impartial, calm, and dispassionate consideration, to which petitioner was entitled.

What the Trial Judge said and the manner in which he said it after objection was taken, did not have the effect of removing the prejudice already imbedded (R. 109).

In *Rudd* v. *United States*, (C. C. A. 8), 173 Fed. page 912, at page 914, the Court said:

> "* * * A mere withdrawal of words, and a direction to the jury that the question is for them, is not always sufficient. The effect of what was said may remain."

In *Parker* v. *United States*, (C. C. A. 6), 2 Fed. (2d) p. 710, 711, the Court said:

> "Under all the recited circumstances, we are compelled to think this portion of the charge to have the aspect of argument and advocacy beyond the permissible limit. *Wallace* v. *U. S.* (C. C. A.), 291 F. 972, and cases cited. (The Wallace case was decided after the trial of this case.) An objection in this respect is not necessarily removed by the formal statement that the jury was under no obligation to adopt the judge's opinion; indeed, that statement may well be put in such a form as to imply disparagement of the jury's intelligence if it does not agree with the judge; the present charge does not lack that atmosphere."

In *Robinson* v. *United States*, (C. C. A. 8), 32 F. (2d) 505 at page 508, the Court said:

> "There are times when no admonition or instructions of the court can remove from the jury's mind the effect of improper conduct and remarks • • •."[11]

The Trial Judge invited counsel to the bench in order that they might state their objections to the charge, *out of the hearing of the jury.* The side-bar conference was in subdued tones, and was inaudible to the jury who were still seated in the courtroom (R. 109). After counsel stated his objection, the Judge unnecessarily disclosed to the jury what had taken place, and indicated resentment and hostility. The jury must have obtained the impression that counsel were guilty of gross impropriety for having even complained. If the Judge deemed counsels' complaint utterly devoid of merit, he should have merely overruled it without comment. After his most definite and determined actions and assertions, it did not help matters any for him to tell the jury —"I am giving you no intimation of how I feel."

11. See also *Wallace* v. *United States* (C. C. A. 6), 291 Fed. 972, 975; *Bolivar* v. *Kelly* (C. C. A 6.), 69 Fed. (2d) 58, 59.

CONCLUSION.

It is respectfully submitted that the judgment should be reversed and the indictment dismissed for the reasons stated in Point I. At the least, petitioner is entitled to a new trial, because of the Trial Court's prejudicial animated argument to the jury.

Respectfully submitted,

HAROLD SIMANDL,
Attorney for Petitioner.